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# VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

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A. R. LONG, Esq., of the Lynchburg bar, has prepared an annotated edition of the present Constitution of Virginia, accompanied by a reprint of previous Constitutions of this State. The volume will be published by the J. P. Bell Co., of Lynchburg, and is now going through the press. It will be ready for delivery before the assembling of the Constitutional Convention on June 12.

Mr. Long is a careful and accurate lawyer, and the volume, coming opportunely on the eve of the Constitutional Convention, ought to meet with ready reception by the bar generally, and particularly by the members of the Convention.

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WE present as a frontispiece with this number an excellent portrait of Judge Stafford G. Whittle, whose recent election to the vacancy on the Supreme Court of Appeals of Virginia, caused by the death of the lamented Judge Riely, has been a source of gratification to the bar of the State, and of whose distinguished career as a circuit judge we have already made mention.

Our previous experience with portraits of the judges of the Supreme Court of Appeals has not been a happy one, and is doubtless fresh in the minds of our readers, as it is certainly in the minds of the judges themselves. We have, therefore, thought long and seriously, and taken expert opinion, before declaring Judge Whittle's portrait a true likeness.

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WE shall be glad to hear from any subscriber who has made, or will make and report upon, an investigation of the question of the right of a common carrier in Virginia to enforce the carrier's lien for freight, by a sale of the goods.

Section 2491 of the Virginia Code provides a method for enforcing, by sale, the lien of mechanics for repairs, of innkeepers, and of livery-stable keepers, given by sections 2488-2490, and the common law lien of any bailee, "except such as is mentioned in sections 1221

and 1222." The bailees mentioned in the sections referred to, are "any express, railroad or other company, engaged in any way in the transportation of articles of any kind as freight or baggage"—but, singularly enough, these sections are exclusively devoted to the disposition of *unclaimed* articles transported, and make no reference to articles held under the carrier's lien.

It would seem, therefore, unless there is other statutory provision which we have overlooked, that incorporated carriers stand, in Virginia, merely on their common law lien—which lien gives the right to *hold* but not to *sell*. Schouler, *Bailments and Carriers* (3d ed.) 126, 550.

It is possible that property on which the consignee refuses to pay the freight, and which is held for the carrier's charges, may be embraced in the term "unclaimed articles" as used in section 1221. *Sed quare*.

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IN *Hampton v. Hampton*, 87 Va. 148, it was held that in a suit for divorce on the ground of adultery, evidence that the defendant admitted the charge, and a letter written by her purporting to admit it, are not admissible. The decision itself, and the fact that it is not in accord with the well established rule in Virginia, are probably now well known to the profession; yet, as it may still mislead the unwary, it may be well to call attention to it.

The statute (sec. 2260, Code 1887), provides that suits for divorce "shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed; and, whether the defendant answer or not, the cause shall be heard independently of the admissions of either party in the pleadings or otherwise."

"The object of these provisions," says Prof. Minor, 1 Inst. 268, "is to prevent a divorce from being obtained by the *collusion of the parties*; and they are no more than an enactment of principles which have always prevailed in matrimonial causes. . . . Neither the common-law rule nor the statutory enactment *excludes* proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded *wholly* upon such admissions. When collusion is proved not to exist, admissions, whether verbal or contained in letters, are peculiarly satisfactory evidence; and especially is this so when the letters were written, or the verbal statements made, without reference to the controversy touching the divorce."

The leading case in Virginia is *Bailey v. Bailey*, 21 Gratt. 43, 51,

where it was said that the statute was merely intended to prevent decrees for divorce upon the collusion of the parties, or upon the consent or default of the party charged. "We are of opinion," says the court, "that the letters of the parties may be admitted in evidence in a suit for divorce (except where it is shown they were written by collusion for the purpose of obtaining a divorce) just as in any other case, for the purpose of proving, or as tending to prove, facts pertinent to the question which the court is called upon to decide, to have precisely the same weight as in other cases."

In *Cralle v. Cralle*, 79 Va. 182, 186, witnesses testified that they had seen bruises on the person of the wife, and that the husband had confessed to them that he had treated her cruelly and had struck her. "And these admissions," said Lewis, P., in delivering the opinion of the court, "are not only competent evidence in support of the averments of the answer, but evidence of the most satisfactory character."

J. C. L.

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WE publish elsewhere two papers from the pen of A. Caperton Braxton, Esq., of the Staunton bar, on the general powers of Constitutional Conventions, and on the particular powers of the Constitutional Convention soon to assemble in Virginia, of which body Mr. Braxton is himself a prospective member.

This subject has received much attention of late in the lay press of the State, in which the opinion has been very generally expressed that Constitutional Conventions exercise sovereign powers, and are subject to no restraints except those of the Federal Constitution.

It is a fortunate circumstance that the subject should have received, in advance of the assembling of the Convention, the attention of so careful and so competent a student of constitutional history and constitutional government, as the author of these papers shows himself to be, and that the fallacy of the popular notion of omnipotence inherent in the approaching Convention in Virginia, should be so thoroughly established before it sinks deeper into the minds of the people and of the members of the Convention.

Mr. Braxton's conclusion is that a Constitutional Convention is not, as often asserted, a revolutionary body, with unlimited powers, but is a legitimate, orderly, representative and constitutional assembly, exercising well recognized functions, and possessing only such limited powers as the people have expressly, or by plainest implication, conferred upon it. It is not itself the Government, nor does it, or the

new Government it may establish, supersede the existing Government, unless and until the people, of whom the Convention is but an agent, have so willed, and have given legal expression to such will.

“Viewed in this light” says the author, “the Constitutional Convention, instead of being a menace to liberty, a dangerous experiment with a body of vast, vague, unknown and unlimited powers, will be seen to be just as regular, legitimate, and normal a body as the Legislature; that its powers and functions are just as well defined and as strictly limited; that the alteration or reconstruction of a constitution need, and should, involve no more resort to revolution or a ‘state of nature’ (even in theory), and be fraught with no more danger to the commonwealth than the enactment of an ordinary statute; and that the change from the old to the new constitution should involve no more irregularity or breach in the smooth and peaceful continuity of government than the change of executives.” The author points out the clear line of demarcation between the “revolutionary” conventions by which our first constitutions were adopted—when by reason of the throwing off of English rule no government was left, and it was therefore necessary to fashion a government from the very beginning—and the modern “constitutional” convention, called by and operating under an already established constitutional government.

Our own independent investigations had led us, but less surely, to similar conclusions as to the right of the people to limit the powers of their representatives, whether assembled to frame legislative or constitutional enactments, and we have no difficulty in concurring in the main with Mr. Braxton’s reasoning and conclusions.

Assuming it to be established in the first of these papers, that the Virginia convention will have only the powers conferred upon it by the people, it is pointed out in the second paper that these powers have actually been conferred in language so indefinite as to raise difficult questions of construction. The main powers of the convention, as shown, are expressed in the declared purpose of calling it—a purpose sanctioned by a vote of the people—namely, “*To revise the Constitution and amend the same.*” This language is that prescribed by the present Constitution (Art. XII, sec. 2), as the form in which shall be referred to the popular will, the question of revising or amending the existing Constitution.

Mr. Braxton points out the equivocal nature of this language, and suggests the difficult question of interpretation presented by it. By a stricter construction, under the principle that to doubt is to decide in

favor of the public, and against the extension of delegated power by implication, and read in the light of our political history, this language would fairly mean to '*propose* a revised and amended Constitution' to the people for ratification, while, by a more liberal construction, it might be interpreted as conferring plenary power on the convention to promulgate a Constitution, without submitting it to a popular vote. This question will doubtless be the subject of extensive debate in the convention, unless the body shall determine, at all events, to submit its work to the people for ratification or rejection, regardless of any question as to the necessity for such submission.

The REGISTER is not closely enough in touch with popular sentiment to know which interpretation would be more popular among the people of the State. But it ventures to hope that in the interest of public policy, and in keeping with historical precedent in Virginia, and for the sake of the greater stability of the new régime if adopted—"broad-based" as it will be "upon the people's will"—the Convention may deem it the wiser course, aside from any question of necessity, to refer its action back to the people, and to the whole people, for their approval or disapproval.

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THE bar of the State will doubtless be interested in the opinion of the Supreme Court of the United States in *Atherton v. Atherton*, published elsewhere in full. It will be observed that there is nothing novel or revolutionary in the decision, as indicated by the press dispatches announcing it. The point decided, in brief, is, that where a divorce is granted to a husband, in the State of his domicil, and of the matrimonial domicil, on constructive service of process, and after reasonable effort to give actual notice to the absent wife, in accordance with the statutes of the State where the suit is brought, a decree of divorce entered in such suit is entitled to full faith and credit, under the United States Constitution, in every other State, and is binding on the wife, so far as it declares a matrimonial dereliction on her part and divorces the parties for the cause so found, as effectually as if she had been actually served with process in the home State or had voluntarily appeared.

It has long been regarded as settled by an overwhelming preponderance of reason and authority that a divorce granted by the State of the domicil of either consort, on constructive service of process, duly authorized by the *lex fori*, is binding on the absent consort, even without actual notice, provided the service authorized was reasonable—

and that a decree so entered is binding in every other State, so far as it ascertains and declares the status of the parties, and is not *in personam*. This doctrine had not, however, distinctly received the sanction of the United States Supreme Court until the decision in the principal case.

The New York courts have persistently declined to recognize the prevailing doctrine, but the principal case will necessarily give the doctrine a uniform operation throughout the country. Mr. Justice Peckham was loyal enough to his New York training to dissent.

The opinion in the principal case approves the general rule stated, *arguendo*, but the court is careful to confine its decision to the precise case before it—namely, where the suit is brought in the State of the plaintiff's domicil and of the matrimonial domicil, and reasonable steps to serve actual notice on the absent defendant are required by local statute, and the requirements of such statute are carefully observed.

The general rule of international law is, that each State has the right to determine the status of its own domiciled citizens. And though, as a general principle, the decree has no extra-territorial operation, yet, as the marriage status can exist only in pairs, it follows that where a husband is declared by a court of competent jurisdiction, and jurisdiction is rightfully exercised, to be no longer a married man, such a decree *ex necessitate* operates to release the wife from the bonds of the marriage, since there can be no wife without a husband. As aptly illustrated by Mr. Bishop, the matrimonial status may be likened to a pair of scissors—if one blade be removed no scissors remain. 1 Bishop, Mar. Div. and Sep. 698-702; 2 Id. 133, 137-158.

Two other cases decided by the Supreme Court on the same day with the *Atherton* case, illustrate the converse of the rule enforced in that case. These are *Bell v. Bell*, 21 Sup. Ct. 551, and *Streitwolf v. Streitwolf*, Id. 553.

In *Bell v. Bell*, it is held that no valid divorce can be entered on constructive service of process by the courts of a State in which neither party has acquired a *bona fide domicil*—and recitals of jurisdictional facts in the record of such suit may be contradicted, in a subsequent suit between the same parties in another State. This decision is likewise carefully confined to the precise question presented—namely, the effect of a decree of divorce where neither party is domiciled in the State where the decree is entered, and where *process is constructively served, with no appearance by the defendant*. On principle and au-

thority, the effect would have been the same, had there been actual service of process within the State, and actual appearance and defense made—since no State has jurisdiction to determine the status of a married pair, neither of whom is domiciled therein. *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260 (*per* Cooley, J.); *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; 2 Bishop, Mar. Div. & Sep. 41–75; though in *Re Ellis Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, it is held that neither party who voluntarily submits to the jurisdiction in such case, will be permitted in a collateral civil proceeding to question the validity of such a divorce—voluntary submission to the jurisdiction operating as an estoppel. See further on this point 1 Bishop, Mar. Div. & Sep. 1470, 1513; 2 Id. 187.

The main point decided in *Streitwolf v. Streitwolf*, the third of these cases, was substantially the same as that in *Bell v. Bell*, with a similar ruling, namely, that a divorce granted to a husband in North Dakota, where he had acquired no *bona fide* domicil, is no defense to a divorce suit brought by his wife, and pending against him at that time in New Jersey, both parties being domiciled citizens of New Jersey.

The subject of jurisdiction in divorce proceedings, and the effect of constructive service of process, was discussed at some length in 2 Va. Law. Reg. 47.



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